2008

Peak Alarm Company, Inc., Jerry D. Howe, Michael Jeffrey Howe v. Salt Lake City Corporation, Shanna Werner, Charles "Rick" Dinse, Scott Atkinson, James Bryant : Brief of Appellee

Utah Supreme Court

Case No. 20080918

IN THE SUPREME COURT OF UTAH

PEAK ALARM COMPANY, INC., a Utah corporation, JERRY D. HOWE, an individual, and MICHAEL JEFFREY HOWE, an individual Plaintiffs and Appellants, v. SALT LAKE CITY CORPORATION a Utah municipal corporation; SHANNA WERNER, an individual; CHARLES "RICK" DINSE, an individual; SCOTT ATKINSON, an individual; and JAMES BRYANT, an individual. Defendants and Appellees.	BRIEF OF APPELLEES SALT LAKE CITY CORP., SHANNA WERNER, CHARLES DINSE, SCOTT ATKINSON, and JAMES BRYANT

On Appeal From the Third Judicial District Court, In and For Salt Lake County, State of Utah, Case No. 050906433

HONORABLE L. A. DEVER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

JURISDICTION

This Court has jurisdiction in this matter pursuant to Utah Code Ann. § 78A-2-102(3)(j) (2008).

STATEMENT OF THE CASE

Defendants agree with Plaintiffs' Statement of the Case with the following exceptions. First, this case arises out of a citation issued to Jeff Howe ("Howe"), and his subsequent prosecution. Plaintiffs' statement that it arises from an alleged "arrest" is argumentative, not factual. Second, Judge Iwasaki dismissed the criminal prosecution of Howe on a directed verdict, concluding that the City prosecutors failed to produce "evidence establishing [Howe's] criminal intent," or that he "knowingly or intentionally made false representations to Salt Lake City dispatch or made a false alarm as defined by Utah Code Ann. § 76-9-105(1)." Finally, Plaintiffs' statement regarding the bases for the trial court's ruling granting summary judgment to Defendants is incomplete and overly simplistic. It suffices to state that the trial court granted Defendants' Motion for Summary Judgment and denied Plaintiffs' Motion for Partial Summary Judgment.

RESPONSE TO PLAINTIFFS' "STATEMENT OF THE FACTS"

Defendants generally object to the five lettered captions of Plaintiffs' Statement of The Facts (designated "A" through "E"). Rather than

statements of fact supported by citation to the record, they are statements of allegation, conclusion, and argument intended to persuade the Court regarding facts which they claim support their assertions. These introductory paragraphs of argument should be stricken, or at least disregarded, by the Court.

Notwithstanding this objection, Defendants respond to the specific paragraphs of Plaintiffs' Statement of The Facts as follows:

Paragraph 1: No citation to the factual record supports Plaintiffs' allegation that any "ongoing" or "heated debate" has existed between Plaintiffs and the City for "the past 10 years." This is merely an unsupported allegation contained in Plaintiffs' Amended Complaint. *R 112-113*. In truth, the record demonstrates otherwise. Any such "debate" was effectively ended when the City adopted and effectuated a verified response ordinance in December 2000 *See Plaintiffs' Statement of The Facts,* ¶ *2, R 990-91, Plaintiffs' Appendix, No 7.*

Paragraph 6: It is important to note that neither Jerry nor Jeff Howe were signatories to this advertisement. *R 2312.*

Paragraph 8 It is important to note that none of the statements attributed to Defendant Shanna Werner ("Werner") in this paragraph had anything to do with any of the Plaintiffs

Paragraph 11: This statement of "fact" is not accurate, and takes Werner's deposition out of context. Werner clearly testified in her deposition that this statement "may have been [true] that week. It may have been a bad week for Peak Alarm customers to call me," and that she does not specifically remember the "context or the time frame of when I wrote that." *R. 2391 at 288:21-24.* She further testified that in her experience as Alarm Coordinator for the Salt Lake City Police Department, she did not believe that Peak Alarm had more complaints than all the other alarm companies put together. She testified, "[n]o. Peak has had their share of complaints. No, I would not say it was more." *Id. at 289:11-12.*

Paragraph 12: Defendants object to the argumentative and conclusory statements made by Plaintiffs in paragraph 12 regarding Werner and Bryant "tarring" the alarm industry and Peak Alarm specifically, or that they "deployed threats" toward any Plaintiff. No record citation supports this allegation regarding Peak Alarm specifically. Again, it is important to note that none of the six cited statements or alleged actions in this paragraph have anything to do with Peak Alarm, Jerry or Jeff Howe specifically.

Defendants further object to Plaintiffs' editorialization in subparagraphs e and f. Werner did not "threaten" anyone at the alarm industry conference, nor did Bryant give a "preview" of what the City would

"bring down on Howe just weeks later." These argumentative and misleading comments should be stricken or disregarded by the Court.

Paragraph 23: It is important to note that Peak Alarm's dispatcher, Brooke Mills, called Salt Lake City Police Dispatch to simply report a burglar alarm at a business, and that two kids had run into the school.

Paragraph 25: The record is clear that neither Mills nor Petersen told Howe that there was a "panic" situation at West High. Petersen told Howe there was an "emergency situation" at West High – an alarm, unknown intruders, verification at the scene, but the police would not respond. *R. 1902 at ¶ 6.* Petersen did not give Howe any specific information regarding who was on scene. *Id. at ¶ 7.* According to Petersen, Howe then called Salt Lake City Dispatch.

According to Mills, she told Howe she "had a burglar alarm at West High School, that there was a woman inside that worked there and stated that there was two people inside the school . . . that weren't supposed to be there . . . that she wanted me to dispatch the police, and that the police would not respond." *R. 822 at 28:13-19.* Mills testified that she did not recall if she told Howe whether the woman appeared to be panicked, or whether she said it was an emergency situation. *R. 822-23 at 28:23 to 29:3.* At that point, Howe told Mills he would take care of it, and Mills went back to her

desk. *R. 823 at 29:4-6*. When she returned to her desk, she put the alarm on hold and continued with other alarms. *Id. at 29:7-10*.

Paragraph 26: The quoted portion of the transcript of Howe's report to Salt Lake City Dispatch clearly demonstrates that he called in "an actual burglar alarm." *R. 831 at 3:1-5*. In fact, he stated it was an "alarm" twice. He abruptly changed his report upon discovering that the police department did not respond to burglar alarms, reporting that it was really "an actual burglary in progress." *Id. at 3:8-9*. The police dispatcher, Joann Ryan ("Ryan"), challenged Howe's report of a "burglary in progress," stating that Peak Alarm's dispatcher (and Howe himself) stated it was merely an alarm. Howe then stated that "my guard" was on scene and asking for police assistance.

The remainder of the conversation, conveniently omitted by Plaintiffs in their brief, is particularly telling.

> **Howe**: Okay. And I'll talk to her about that just to clarify that, but no, this is an actual break-in.
> . . . . .
> **Ryan**: And where do we meet you guard at?
> **Howe**: Just in front of the school.
> **Ryan**: Is he in uniform or she?
> **Howe**: Yes, he is.
> **Ryan**: Alrighty.
>
> *R. 831-32 at 3:19 to 4:8.*

Paragraph 42: Any claimed error in Officer Wihongi's report is immaterial and irrelevant to the issues presented in this appeal.

Paragraph 43: Any claimed omission in Officer Wihongi's report is immaterial and irrelevant to the issues presented in this appeal.

Paragraph 45: The quoted testimony of Bryant in this paragraph by Plaintiffs, taken out of context and in isolation, is misleading. In this portion of his deposition, Bryant was explaining why he took it upon himself to issue a citation to Howe, rather than asking a subordinate to do it. The investigating officer on the scene at West High School, Officer Wihongi, clearly testified that his investigation led him to conclude that Howe intentionally misled police dispatchers and police officers by providing false information in order to initiate a police response he could not otherwise obtain, and he passed his conclusions on to Bryant. *R. 1172-73 at 75:17 to 76:2; R. 1175-76 at 78:10 to 79:1; R. 1179 at 116:5-8; R. 1180 at 117:11-15; R. 1181 at 119:2-4; R. 1190 at 185:8-17; R. 1191 at 199:2-4.*

Paragraph 56: This statement of fact is incomplete and misleading. In addition to the factors identified by Plaintiffs in this paragraph, Bryant also based his probable cause determination on the fact that Howe reported a burglary in progress, rather than a simple alarm. *R. 2148 at 94:23-25; 2150 at 102:25 to 103:11 and 104:9-14.* Bryant and Wihongi both concluded that

when Howe reported a burglary in progress to police dispatch, he knew that his report was false. *Id.*

Paragraph 57: See response to paragraph 56.

Paragraph 58: See response to paragraph 56.

Paragraph 61: The facts asserted in this paragraph are irrelevant to the issues on appeal.

Paragraph 62: The facts asserted in this paragraph are irrelevant to the issues on appeal.

Paragraph 63: The facts asserted in this paragraph are irrelevant to the issues on appeal.

Paragraph 64: The facts asserted in this paragraph are irrelevant to the issues on appeal.

Paragraph 65: The facts asserted in this paragraph are irrelevant to the issues on appeal.

Paragraph 66: Werner's opinions regarding Howe's knowledge or intent are irrelevant to the issues on appeal. Further, Werner did not testify that she has no "information" whether Jeff Howe "knowingly" provided false information. She testified that she had no "evidence" of such. Werner's inability to read Howe's mind is admitted.

Paragraph 67: This assertion of 'fact" is blatantly false and contrary to the factual record. Officer Wihongi testified repeatedly that he believed that Jeff Howe knowingly provided false information to SLCPD dispatch. "I believe he [Howe] gave inaccurate information to initiate a police response." *R. 1172 at 75:18.* In response to the following question by counsel, "Do you believe, as you sit here today, that he [Howe] intentionally gave inaccurate information? . . . That is, he gave information that he knew was false?," Wihongi replied "Yes." *Id.* at 75:20-76:2. He testified that "I think that there was enough evidence that I collected that Jeff Howe intentionally misled police officers and dispatchers on that day." *R. 1179 at 116:5-8.* Officer Wihongi further testified that "my findings were that there was probable cause to suggest that he gave misinformation to the Police Department when they responded on this alarm." *R. 1180 at 117:12-15.* In spite of his consistent and firm responses regarding his belief that Howe gave false information, counsel pressed Officer Wihongi to do the impossible, to come up with hard evidence of what was on Jeff Howe's mind when he called dispatch. Officer Wihongi acknowledged that he did not know. *R. 1190-92 at 185:4-7, 186:16 to 187:6.*

Paragraph 74: The inadmissible opinions of Ron Walters should be stricken or disregarded by the Court.

Paragraph 75: The inadmissible opinions of John Mabry should be stricken or disregarded by the Court.

Paragraph 76: Werner's opinions regarding the potential success of Howe's prosecution are irrelevant to the issues on appeal.

SUMMARY OF ARGUMENT

The trial court properly concluded that Plaintiffs failed to demonstrate a lack of probable cause. The probable cause standard is a "practical, nontechnical conception," designed to operate in conjunction with the "commonsense," "practical considerations of everyday life," rather than the elaborate rules employed by "legal technicians." Probable cause requires "only a probability of substantial chance of criminal activity," rather than "an actual showing of such activity."

Here, under the totality of the circumstances, Bryant had probable cause to believe Howe violated the false alarm statute. Howe reported a "burglary in progress," an "actual break-in," when in reality it was only an alarm call from West High School after two teenage girls walked into the school when school was not in session. Howe claimed that a uniformed male guard had visually confirmed the burglary in progress, and would meet officers in front of the school. In reality, the person reporting the alarms was a female cafeteria worker. The investigating officer concluded that Howe

intentionally and knowingly provided false information of the crime to police dispatch in order to obtain a police response that he could not have otherwise gotten Based on this information, Bryant issued a misdemeanor citation to Howe, reasonably concluding that probable cause existed to believe that Howe committed a violation of the law.

The fact that Howe won a directed verdict in his criminal trial does not conclusively establish a lack of probable cause, and Plaintiffs' claims of estoppel do not apply because the parties, issues and standards between the criminal trial and this civil action are entirely different.

The trial court properly applied the Utah Governmental Immunity Act to this case, holding that Plaintiffs failed to allege that Defendants acted with fraud or malice, as required in the notice of claim provisions of the Immunity Act. The trial court correctly held that Plaintiffs failed to file a compliant notice of claim within one year of the accrual of their causes of action Even if this Court disagrees, Plaintiffs' causes of action would have been dismissed on other grounds, so the trial court's error (if any) would be harmless

Finally, the Defendants were properly granted qualified immunity on Plaintiffs' federal civil rights causes of action Plaintiffs failed to demonstrate a lack of probable cause, there is no Fourth Amendment

malicious prosecution claim where, as here, Howe was never incarcerated, and the trial court properly dismissed new causes of action that were first raised by Plaintiffs in their opposition to summary judgment. Further, Plaintiffs' Fourteenth Amendment claims fail due to their inability to demonstrate any extreme or outrageous conduct on the part of Defendants that is truly conscience shocking. Finally, the City and supervisory Defendants were properly dismissed because there is no competent evidence to support Plaintiffs' claims of ongoing tortuous conduct, failure to discipline, unconstitutional policy, or personal participation by the supervisory defendants.

ARGUMENT

I.

THE TRIAL COURT DID NOT ERR IN CONCLUDING THAT PLAINTIFFS FAILED TO DEMONSTRATE A LACK OF PROBABLE CAUSE

Plaintiffs are correct in conceding that their claims in this matter largely stand or fall on the issue of probable cause. To succeed in their claims, Plaintiffs, not Defendants, must allege and prove that Defendants lacked probable cause to cite and prosecute Jeff Howe. *Wilder v. Turner*, 490 F.3d 810, 813-14 (10TH Cir. 2007) (plaintiff must prove lack of probable cause in § 1983 action for unlawful arrest); *Hartman v. Moore*, 547 U.S.

250, 258 and 265-66 (2006) ("In an action for malicious prosecution after an acquittal, a plaintiff must show that the criminal action was begun without probable cause for charging the crime in the first place;" plaintiff must prove lack of probable cause in First Amendment retaliation claim).

The United States Supreme Court has repeatedly reiterated that the probable cause standard is a "practical, nontechnical conception," designed to operate in conjunction with the "commonsense," "practical considerations of everyday life," rather than the elaborate rules employed by "legal technicians." *Illinois v. Gates*, 462 U.S. 213, 230-31 (1983). Probable cause requires "only a probability of substantial chance of criminal activity," rather than "an actual showing of such activity." *New York v. P J. Video, Inc* , 475 U.S. 868, 877-78 (1986). Under this standard, innocent conduct may inevitably support some showings of probable cause. See *Gates*, 462 U.S. at 243 n. 13; see also *Massachusetts v. Upton*, 466 U.S. 727, 734 (1984) (recognizing that "probable cause does not demand the certainty we associate with formal trials").

While Plaintiffs spend considerable time attempting to convince this Court that Howe was not guilty of making a false report, that is not the issue before the Court. A finding of probable cause rests not on whether particular conduct is "innocent" or "guilty," but on the "degree of suspicion

that attaches" to the Defendants' evidence. *Illinois v. Wardlow*, 528 U.S. 119, 128 (2000); *United States v. Soto*, 375 F.3d 1219, 1222 (10th Cir. 2004) (probable cause does not require facts sufficient for a finding of guilt). Measuring the degree of suspicion that attaches to a set of facts requires this Court to view the Defendants' evidence through the lens of those "versed in the field of law enforcement," not applying the "library analysis" employed by constitutional "scholars." *Texas v. Brown*, 460 U.S. 730, 742 (1983).

A.

PLAINTIFFS FAILED TO DEMONSTRATE A LACK OF PROBABLE CAUSE UNDER THE TOTALITY OF THE CIRCUMSTANCES.

In examining the events leading up to the citation and prosecution of Howe, and the reasonable inferences drawn from those facts, viewed from the standpoint of an objectively reasonable law enforcement officer, this Court must conclude, as the trial court did, that Plaintiffs have failed to demonstrate a lack of probable cause.

Here, Sgt. Bryant had probable cause to believe that Jeff Howe violated Utah Code Ann. § 76-9-105. It is undisputed that on June 27, 2003, at approximately 8:46 a.m., the burglar alarms at West High School were triggered. It is further undisputed that a Peak Alarm employee called Salt Lake City Police Department ("SLCPD") Dispatch to request that SLCPD

officers respond to the scene, but was told that officers would not respond to a burglar alarm. Howe, after being informed that SLCPD officers would not respond, admits that he called SLCPD Dispatch and told them that a Peak Alarm guard was on scene asking for police assistance, that the guard visually verified a "burglary in progress" (rather than merely a burglar alarm), that it was "an actual break-in," that "my guard is asking for police assistance," that the guard could be found "just in front of the school," and that "he" [the guard] was wearing a uniform. No evidence exists that anyone told Howe that this was a "burglary in progress" or an "actual break-in," or that any male guard was on scene and in uniform. Regarding his last representation of the guard in uniform, it is important to keep in mind that the caller from the school, Diane Hoyt, is a woman. All of these reports to police dispatch by Howe were admittedly and undisputedly false statements.

It is further undisputed that Officer Wihongi, the investigating officer on the scene that day, spoke with Howe by telephone twice regarding his report to police dispatch. In his first conversation with Howe, Officer Wihongi testified that Howe admitted that he made "assumptions" that turned out to be untrue, but stated that he did "whatever it takes" to get a police response. Based on his conversations with Howe and his investigation of the West High School incident, Officer Wihongi concluded

that Howe intentionally gave inaccurate information to SLCPD Dispatch that he knew was false in order to initiate a police response. Officer Wihongi communicated his conclusions to Sgt. Bryant both verbally in a face-to-face meeting and through his written report.

Sgt. Bryant was entitled to rely on the information provided to him by Officer Wihongi in his report and the conclusions he reached as the investigating officer on scene, as long as his reliance was reasonable. *See Oliver v. Woods*, 209 F.3d 1179, 1190 (10th Cir. 2000) ("police officers are entitled to rely upon information relayed to them by other officers in determining whether there is reasonable suspicion to justify an investigative detention or probable cause to arrest"); *United States v. Hensley*, 469 U.S. 221, 231 (1985) ("[e]ffective law enforcement cannot be conducted unless police officers can act on directions and information transmitted by one officer to another"). Sgt. Bryant then consulted with a city prosecutor, Holly Barringham, to informally screen the facts of this incident and whether any statute had been violated. Ms. Barringham advised Sgt. Bryant that, in her opinion, the facts of this case fit within the elements of Utah Code Ann. § 76-9-105, and that the issuance of a citation would be an appropriate course of action. In reliance on the conclusions reached by Officer Wihongi in his

investigation, and Ms. Barringham's legal advice, Sgt. Bryant proceeded forward with issuing a citation to Jeff Howe.

In Utah, seeking the advice of counsel is a defense to a malicious prosecution action where the issue is whether particular conduct meets the elements of some crime, supporting the officer's good faith and negativing any malice. *Blonquist v. Summit County*, 483 P.2d 430, 436 fn. 11 (Utah 1971); *Perkins v. Stephens*, 503 P.2d 1212, 1213 (Utah 1972). "An accuser may justifiably rely on the advice of counsel as to the existence of probable cause only if the advice is sought in good faith and after a full disclosure to counsel of the accuser's knowledge and information based on a reasonable investigation by the accuser." *Hodges v. Gibson Products Co.*, 811 P.2d 151, 160 (Utah 1991) (citations omitted). This defense includes reliance on a prosecuting attorney's conclusion that a prima facie case exists. *Id.*

Utah Code Ann. § 76-9-105 provides, in relevant part:

> (1) A person is guilty of making a false alarm if he initiates or circulates a report or warning of any fire, impending bombing, or other crime or catastrophe, knowing that the report or warning is false or baseless and is likely to cause . . . public inconvenience or alarm or action of any sort by any official or volunteer agency organized to deal with emergencies.

The facts of this case demonstrate that any reasonable officer would have probable cause to believe that Howe violated Utah law. There is no dispute that Howe reported a burglary in progress at West High School that

had been verified, when in reality, there were only burglar alarms going off due to teenagers reportedly walking into the building. No evidence of any crime was discovered. Contrary to Plaintiffs' assertions, Defendants have not admitted that any crime occurred. Further, there is no dispute that Howe falsely reported that a male Peak Alarm guard was on-scene, in uniform, and would meet the officers in front of the building. Finally, the investigating officer talked with Jeff Howe twice about his report, and concluded that Howe intentionally reported false information to SLCPD Dispatch that he knew was false in order to initiate a police response which he could not otherwise obtain. Thus a prudent officer would be reasonable in his belief that Howe violated state law under the circumstances.

Howe's justifications for his actions do not affect the probable cause determination. "Once Defendants concluded that the initially discovered facts established probable cause, they were under no obligation to forego arresting Plaintiff or release him merely because he said he was innocent." *Romero v. Fay*, 45 F.3d 1472, 1481 (10th Cir. 1995). Probable cause is an objective standard, and is evaluated "in relation to the circumstances as they would have appeared to prudent, cautious and trained police officers." *United States v. Davis*, 197 F.3d 1048, 1051 (10th Cir. 1999). Neither Sgt. Bryant nor the city prosecutors were under any obligation to withhold the

issuance of a citation or commencement of prosecution merely because Howe insisted he was innocent.

Plaintiffs contend there was no probable cause because Sgt. Bryant and the City lacked proof of criminal intent to violate state law. To show probable cause for intent, "the State must only prove that its theory of intent is reasonable." *State v. Ingram*, 139 P.3d 286, 290 (Utah Ct.App. 2006) (additional citations omitted). "Knowledge or intent is a state of mind generally to be inferred from the person's conduct viewed in light of all the accompanying circumstances." *Id., citing State v. Kihlstrom*, 1999 UT App 289, ¶ 10, 988 P.2d 949; see also *State v. Wallace*, 2006 UT App 232, ¶ 23, 138 P.3d 599 ("The Utah Supreme Court 'ha[s] held that intent to commit a crime may be inferred from the actions of the defendant or from surrounding circumstances." (alteration in original) (quoting *State v. Colwell*, 2000 UT 8, ¶ 43, 994 P.2d 177)). "So long as there is some evidence including reasonable inferences, from which findings of all the requisite elements of the crime can reasonably be made, our inquiry stops." *Id., citing State v. Hall*, 946 P.2d 712, 724 (Utah Ct.App. 1997). Significantly, the evidentiary standard necessary to "support a reasonable belief that an offense has been committed and that the defendant committed it" is "relatively low." *State v. Clark*, 2001 UT 9, ¶¶ 10, 16, 20 P.3d 300.

The City's officers and prosecutors cannot be held to an impossible standard of proving, at the pre-citation stage, what Howe's state of mind or knowledge was at the time he made his report. This would require City officers and prosecutors to read a suspect's mind to develop the level of proof plaintiffs argue is required before proceeding with issuance of a citation or initiating prosecution. Such a standard would make any action based on knowing falsehoods impossible to prosecute. Instead, the defendants need only show that their theory of intent was reasonable based on Howe's conduct viewed in light of all the accompanying circumstances and any reasonable inferences drawn therefrom.

The reasonable inferences drawn from Howe's conduct, statements, and circumstances of the incident support any prudent officer's conclusion that Howe knowingly provided a false report. Plaintiffs merely disagree with the credibility decisions, inferences and conclusions that the defendants elected to draw from those facts. Again, probable cause does not require facts sufficient for a finding of guilt. *Soto*, 375 F.3d at 1222. After receiving his citation, Howe was free to argue at trial that his statements were not false or were not knowingly false, which he did.

All of the above arguments equally apply to the prosecutor's decision to move forward with the prosecution of Jeff Howe. There was no

requirement that they be sure of a conviction, only that their belief that Howe's actions may have constituted a violation of state law be reasonable. The prosecutors are not required to read Jeff Howe's mind, nor are they under any obligation to withhold prosecution merely because of Jeff Howe's protestations of innocence. The mere fact that the prosecution resulted in a directed verdict for Howe in no way establishes that any constitutional violation occurred. Indeed, Howe was provided with due process, and he prevailed. Whether or not the City put on a good case regarding Jeff Howe's mental state of mind or intentions is irrelevant. The only requirement is that their belief that Howe knowingly or intentionally made false representations be reasonable under the circumstances. The defendants have met that requirement, and plaintiffs have failed to demonstrate, as is their burden, that no probable cause existed to cite and/or prosecute Jeff Howe.

Here, on summary judgment in a civil lawsuit, the question before the court is not whether Howe was guilty of a crime beyond a reasonable doubt, but whether the facts and circumstances within Officer Bryant's knowledge were sufficient to warrant a prudent officer in believing that a criminal offense may have been committed. Plaintiffs spend considerable effort attempting to show that Wihongi and Bryant were unable to read Howe's mind with regard to intent. Their inability to do so is conceded. However,

Bryant and Wihongi had more than adequate bases to believe that Howe may have violated the false alarm statute[1].

Contrary to Plaintiffs' assertions, an officer's reasonable belief that a criminal violation has occurred does not require mind-reading capabilities or voodoo magic. "Unless the court is somehow able to open the mind of the defendant to examine his motivations, intent is of necessity proven by circumstantial evidence." *State v. James*, 819 P.2d 781, 789 (Utah 1991). Here, defendants need only demonstrate a reasonable belief that Jeff Howe knowingly made a false report or warning. "Under the Utah Criminal Code, a defendant acts 'knowingly' if 'he is aware of the nature of his conduct.'" *State v. Johnson*, 2007 UT App 392, ¶ 11, fn. 5, 174 P.3d 654, *quoting* Utah Code Ann. § 76-2-102 (Supp. 2007). Defendants need not produce evidence that he acted with fraudulent intent, bad motive, or that the false information harmed the City. *Id.* at ¶ 15.

Plaintiffs' arguments regarding statutory interpretation are precisely the kind of elaborate rules employed by "legal technicians" and "constitutional scholars," not law enforcement officer. They are the

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[1] Plaintiffs include Werner in their allegations regarding probable cause and a "rush to judgment." These allegations completely ignore the fact that Shanna Werner is not a police officer and has no law enforcement authority of any kind, nor is she a lawyer or prosecutor. This absurd allegation is not a misuse of state power but rather an invention of it. One cannot misuse power that one does not possess.

"hypertechnical" constructions that are expressly disallowed by the United States Supreme Court. While Plaintiffs claim to argue for a "plain language" reading of the false alarm statute, it is they, and not Defendants, who seek to stretch the statute "beyond recognition" by imposing requirements on the statute that cannot be construed to exist under any plain reading of the statute. Viewed through the lens of those "versed in the field of law enforcement," as this Court must, it is evident that Plaintiffs have failed to demonstrate a lack of probable cause.

In Utah, a "false statement" is "any incorrect or untrue statement." *Johnson*, 2007 UT App at ¶ 11 . It is undisputed that Howe reported a "burglary in progress" to SLCPD dispatch when, in fact, it was simply two teenage girls walking into the school. Commonsense dictates the conclusion that an alarm being triggered in this situation is not the same as a "burglary in progress" or an "actual break-in." This is particularly true where, as here, the person making the report is an alarm industry professional who should know better, and who stated to a police officer that he did "whatever it takes" to get a police response. It is undisputed that Officer Wihongi found no evidence of any forced entry, damage, theft or any other crime at West

High School[2]. The fact that defendants, in the face of this total lack of evidence of a crime, cannot conclusively prove that no burglary actually occurred that day is meaningless to a probable cause analysis.

B.

JUDGE IWASAKI'S DIRECTED VERDICT DOES NOT CONCLUSIVELY ESTABLISH A LACK OF PROBABLE CAUSE

No presumption regarding the existence of probable cause can be established by Judge Iwasaki's ruling on directed verdict because the issues before the court were fundamentally different, as were the standards to be applied by the court. Judge Iwasaki's ruling found that the evidence

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[2] Plaintiffs dispute that Officer Wihongi did not find any evidence of any crime at West High School. However, they do not present any evidence or legal argument in support of the commission of any crime that they contend occurred at the school. The facts are that two teenage girls reportedly walked into West High, no teenage girls were found at the school, no damage or theft was discovered, and no evidence of their intent was discovered during Wihongi's investigation. "An actor is guilty of burglary if he enters or remains unlawfully in a building . . . with intent to commit: (a) a felony; (b) theft; (c) an assault on any person; (d) lewdness . . . ; (e) sexual battery . . . ; lewdness involving a child . . . ; or (f) voyeurism against a child . . ." Utah Code Ann. § 76-6-202 (emphasis added). "A person is guilty of criminal trespass if . . . (a) he enters or remains unlawfully on property and: (i) intends to cause annoyance or injury to any person or damage to any property . . . (ii) intends to commit any crime, other than theft or a felony; or (iii) is reckless as to whether his presence will cause fear for the safety of another." Utah Code Ann. § 76-6-206 (emphasis added). No evidence exists to suggest they entered or remained unlawfully in the building. As such, the mere fact that they walked into a public building does not constitute evidence of any crime.

presented by the prosecutor failed to prove Howe's intent or knowledge beyond a reasonable doubt.

Contrary to Plaintiffs' numerous erroneous assertions, Judge Iwasaki did not rule that "there existed no evidence that Howe committed the crime with which he was charged" (Plaintiffs' Brief at 27), that "Howe had more than sufficient reason to believe a crime was occurring at West High School" (Plaintiffs' Brief at 30), or that there is "no evidence . . . that Howe violated the statute" (Plaintiffs' Brief at 32). This was a criminal trial on the merits, not a preliminary hearing or a motion to suppress, where the existence of probable cause would be at issue before the court. Indeed, the ruling makes no mention whatsoever of probable cause. The *Olson* and *McKenzie* cases cited by Plaintiffs do not support their contention of a conclusive presumption of lack of probable cause.

C.

ESTOPPEL DOES NOT APPLY

On page 27 of their brief, Plaintiffs apparently argue that Defendants in this matter are estopped from arguing the probable cause issue based on Judge Iwasaki's ruling in Howe's criminal prosecution. They argue Defendants had "a full and fair opportunity to present evidence" against Howe in the criminal trial, and that the trial court below erred in allowing

Defendants to "relitigate" that issue, resulting in what they claim are "conflicting results." This argument is without merit.

There can be no dispute that Werner and Bryant were not parties to Howe's criminal prosecution, and had no opportunity whatsoever to litigate these issues. The City prosecutors are not parties to this action. Further, Plaintiffs confuse the issues in controversy in the two actions. In the criminal trial, the issue was whether the prosecution produced evidence that proved beyond a reasonable doubt that Howe intended to make a false report, or knowingly or intentionally provided a false report. The prosecution failed to satisfy Judge Iwasaki on those elements, and Howe prevailed on his motion for a directed verdict. Here, the issue is whether the information known to Defendants, and the reasonable inferences drawn therefrom, gave them a reasonable basis to believe that Howe may have committed a crime.

Because the parties, issues and standards presented in the two cases are not identical, estoppel does not apply.

II.

THE TRIAL COURT APPROPRIATELY APPLIED THE UTAH GOVERNMENTAL IMMUNITY ACT.

The trial court correctly concluded that Plaintiffs' Notice of Claim (Plaintiffs' Appx. No. 5) failed to strictly comply with the requirements of

Utah Governmental Immunity Act ("the Immunity Act"), Utah Code Ann § 63-30-1 et seq As framed by Plaintiffs in this appeal, the trial court's ruling on this issue was limited to the individually-named Defendants. The trial court dismissed all state law claims against the City on other grounds which are not at issue in this appeal.

The Immunity Act governs all lawsuits brought against governmental entities and/or their employees,[3] and provides immunity from suit for governmental entities unless otherwise waived *Id.* § 63-30-3. Employees of governmental entities are similarly immune for conduct undertaken in their official capacities during the performance of their duties, within the scope of employment, or under color of authority. *Id.* § 63-30-4(3).

The Immunity Act requires the filing of a notice of claim as a prerequisite to suit. Utah Code Ann. § 63-30-11(2). The notice must be submitted within one year after the claim arises, and must be filed with the City Recorder. *Id* at § 63-30-11(3)(b)(ii)(a). Such notice is required regardless of whether the suit is against the City or its employees. *Madsen v Borthick*, 769 P 2d 245, 249-50, 252 (Utah 1988)

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[3] The Immunity Act was repealed and re-enacted as Utah Code Ann § 63-30d-101 et seq effective July 1, 2004 However, it is undisputed that all relevant allegations in this case occurred prior to the effective date of the Immunity Act's repeal Therefore, the provisions of Utah Code Ann § 63-30-1 et seq apply to all of Plaintiffs' state law claims

Utah law mandates strict compliance with the requirements of the Immunity Act. *See, e.g., Greene v. Utah Transit Authority*, 37 P.3d 1156, 1159 (Utah 2001). A claimant must comply with the requirements of the Immunity Act to confer subject matter jurisdiction upon the district court. *Id.* Failure to comply with the Immunity Act's requirements mandates that the district court dismiss the complaint for lack of subject matter jurisdiction. *Id. See also, e.g., Houghton v. Department of Health*, 2005 UT 63, ¶ 20, 125 P.3d 860 (strict compliance with notice requirements of Immunity Act is necessary to confer subject matter jurisdiction); *Gurule v. Salt Lake County*, 2003 25, ¶ 5, 69 P.3d 1287 (same).

"[T]o recover against a governmental employee personally for injuries occurring during the performance of the employee's duties, a plaintiff's sole remedy is through the Immunity Act, and to properly state a claim for relief, the plaintiff must allege fraud or malice." *Straley v. Halliday*, 2000 UT App 38, ¶ 12, 997 P.2d 338, 341 (Utah Ct.App. 2000) (holding that plaintiff's failure to allege fraud or malice against governmental employee in notice of claim divested court of subject matter jurisdiction), *citing* U.C.A. § 63-30-4(3) and (4);[4] *Day v. State ex rel. Utah Dep't of Public Safety*, 980 P.2d

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[4] This section provides in part:

> (3)(a) Except as provided in Subsection (3)(b), an action under this chapter against a governmental entity or its employee for an injury

1171, 1186 (Utah 1999) ("Government employees are now personally liable only for fraud or malice.").

Plaintiffs' Notice of Claim did not allege that the individual defendants acted due to fraud or malice. Significantly, in opposition to Defendants' Motion for Summary Judgment, Plaintiffs erroneously argued to the trial court that Defendants relied on the wrong version of the Immunity Act. *R. 1983, 1988-90.* They argued that the 2004 re-enacted version (Utah Code Ann. § 63-30d-101 et seq.) applied, and that their Notice of Claim only needed to allege "willful misconduct" against the individual Defendants. As a result, Plaintiffs never raised the argument before the trial court that their Notice of Claim alleged fraud or malice against the individual Defendants.

> caused by an act or omission that occurs during the performance of the employee's duties, within the scope of employment, or under color of authority is a plaintiff's exclusive remedy.
> (b) A plaintiff may not bring or pursue any other civil action or proceeding based upon the same subject matter against the employee or the estate of the employee whose act or omission gave rise to the claim, unless:
> (i) the employee acted or failed to act through fraud or malice . . .
> (4) . . . [N]o employee may be held personally liable for acts or omissions occurring during the performance of the employee's duties, within the scope of employment, or under color of authority, unless it is established that:
> (a) the employee acted or failed to act due to fraud or malice . . .

The trial court properly applied the correct version of the Immunity Act, ruling that Plaintiffs failed to file a compliant Notice of Claim within one year of the accrual of their causes of action[5]. The re-enacted version of the Immunity Act in 2004 clearly provided:

> It is the intent of the legislature that:
>
> (1) injuries alleged to be caused by a governmental entity that occurred before July 1, 2004, be governed by the provisions of Title 63, Chapter 30, Utah Governmental Immunity Act; and
>
> (2) injuries alleged to be caused by a governmental entity that occurred on or after July 1, 2004, be governed by the provisions of Title 63, Chapter 30d, Governmental Immunity Act of Utah.

Laws 2004, c. 267, 48. See also, *Code v. Utah Dept. of Health*, 2007 UT App 390, ¶ 2 fn. 3, 174 P.3d 1134; *Grappendorf v. Pleasant Grove City*, 2007 UT 84, ¶ 3, fn. 2, 173 P.3d 166; *Houghton v. Dept. of Health*, 2005 UT 63, ¶ 3, fn. 2, 125 P.3d 860.

Because all of the injuries alleged by plaintiffs undisputedly occurred prior to July 1, 2004, the Immunity Act cited by defendants, Utah Code Ann. § 63-30-1 et seq., applied to, and barred, all of Plaintiffs' state law claims against the individual Defendants.

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[5] Plaintiffs misconstrue the trial court's ruling when they assert that the trial court erred in granting summary judgment to Defendants based solely on Plaintiffs' untimely filing of their Notice of Claim. The trial court did not so rule. The trial court's grant of summary judgment was based on Plaintiffs' failure to file a Notice of Claim which complied with the fraud and malice requirement within one year of the accrual of their claims.

Plaintiffs did not dispute that their Notice of Claim failed to allege fraud or malice before the trial court. Because they failed to raise the issue below, it is waived on appeal. "[A]s a general rule, claims not raised before the trial court may not be raised on appeal." *Tschaggeny v. Millbank Ins. Co.*, 2007 UT 37, ¶ 20, 163 P.3d 615. This preservation rule gives "the trial court an opportunity to address the claimed error and, if appropriate, correct it." *Id.* Furthermore, "requiring preservation of an issue prevents a party from avoiding the issue at trial for strategic reasons only to raise the issue on appeal if the strategy fails." *Id.*

Therefore, Plaintiffs have waived this issue and failed to preserve their right to raise it on appeal.

Even if this Court decides to consider this issue, it should still affirm the trial court's ruling for several reasons. First, the Notice of Claim does not allege that the individual Defendants acted with fraud or malice. The use of the word "malicious" in generally alleging a malicious prosecution cause of action against the City and its employees in general does not satisfy the Immunity Act's requirements. Similarly, the use of the word "maliciously" in quoting the provisions of the Utah Citizen Participation in Government Act ("UCPGA") fails to comply.

Second, the UCPGA cause of action was dismissed on other grounds not at issue in this appeal. Thus, any possible inference of fraud or malice against any individual Defendant must be limited to this cause of action only.

Third, the only causes of action dismissed for failure to comply with the Immunity Act were Plaintiffs' False Arrest/Imprisonment and Malicious Prosecution claims. Even assuming the trial court erred in dismissing these claims for failure to comply with the Immunity Act's notice of claim requirements, such error (if any) was harmless. Plaintiffs' False Arrest/Imprisonment claims would have been dismissed anyway for failure to comply with Utah's one-year statute of limitations, which provides that an action for "libel, slander, false imprisonment, or seduction" must be brought within one year. U.C.A. § 78-12-29(4).

There is no dispute that Howe alleges he was "arrested" on July 21, 2003. In Utah, a claim for false arrest/imprisonment arises on the date of the claimed "arrest." *Tolman v. K-Mart Enterprises of Utah, Inc.*, 560 P.2d 1127, 1128 (Utah 1977). The same is true for federal § 1983 actions alleging false arrest. State statutes of limitations for false arrest apply, and the limitation period begins to run when the alleged false imprisonment ended. *Wallace v. Kato*, 127 S.Ct. 1091, 1094-97 (2007). Therefore,

Plaintiffs must have filed their action for false arrest/imprisonment by July 21, 2004. Because the Complaint in this matter was not filed until April 7, 2005, Plaintiffs failed to comply with the one year statute of limitations.

Even if this Court determines that Howe's alleged false arrest continued until he was afforded "legal process," Plaintiffs' Complaint is still untimely. After the citation issued to Jeff Howe was filed with the Salt Lake City Justice Court, Jeff Howe, through his attorney Richard A. Van Wagoner, filed a Notice of Appearance, Substitution of Counsel, and Entry of Not Guilty Plea on July 28, 2003. The certified Justice Court docket shows the date of entry of Howe's Notice and Plea as July 30, 2003. Therefore, his cause of action for false arrest/imprisonment accrued no later than July 30, 2003.

Plaintiffs' reliance on *Wallace v. Kato*, 127 S.Ct. 1091 (2007), is misplaced. In *Wallace*, the plaintiff was arrested and detained in jail until his trial date. The *Wallace* Court determined that a "false imprisonment consists of detention without legal process," and "ends once the victim becomes held *pursuant to such process* – when, for example, he is bound over by a magistrate or arraigned on charges." *Id.* at 1096 (emphasis in original, citations omitted). The Court further stated: "If there is a false arrest claim, damages for that claim cover the time of detention up until

issuance of process or arraignment, but not more." *Id.* The Court concluded that a false imprisonment ends "either when the victim is released or when the victim's imprisonment becomes 'pursuant to [legal] process.'" *Mondragon v Thompson*, 519 F.3d 1078, 1082-83 (10th Cir 2008) (quoting *Wallace*, 127 S Ct. at 1096 (emphasis omitted)). Thus, the claimant's claim accrues either on the date of his release or on the date of legal process. *Mondragon*, 519 F.3d at 1083.

Here, Jeff Howe was never arrested, was never put in jail, nor was he otherwise detained in any way prior to trial He was released immediately upon issuance of the citation on July 21, 2003. Even in the unlikely event that Howe can demonstrate that he was detained, sufficient legal process was instituted when the Information was filed with the Justice Court on July 29, 2003, and Howe entered his not guilty plea on July 30, 2003. In Utah, a prosecution is "commenced" upon the filing of an Information *Utah Code Ann § 77-2-2(3)*[6]. Further, when a citation has been issued, "[a]n information shall be filed and proceedings held in accordance with the Rules of Criminal Procedure and all other applicable provisions of this code if the person cited: . . . (b) pleads not guilty to the offense charged." *Utah Code Ann § 77-7-21(2)(b)*. Thus, legal proceedings were clearly instituted and

[6] Utah Code Ann. § 77-2-2(3) provides: "Commencement of prosecution" means the filing of an information or an indictment."

process initiated against Jeff Howe upon the filing of the Information on July 29, 2003, and at the very latest, on July 30, 2003, when Howe entered his not guilty plea. Howe's false arrest/imprisonment claims are clearly time-barred.

Similarly, Plaintiffs' malicious prosecution claims would have been dismissed on other grounds. Plaintiffs have failed to demonstrate a lack of probable cause (as argued above), failed to demonstrate that any individual Defendant (other than Bryant, arguably) initiated, instituted or procured Howe's prosecution, and set forth no admissible evidence of malice (other than bare allegations, conclusory statements, speculation, conjecture and hearsay, none of which are admissible) on any individual Defendants' part.

III.

THE TRIAL COURT PROPERLY GRANTED QUALIFIED IMMUNITY TO THE INDIVIDUAL DEFENDANTS.

At the outset, Plaintiffs erroneously place the burden of proof on Defendants regarding probable cause. As set forth in Part I. above, to succeed in their claims, it is Plaintiffs who must allege and prove that Defendants lacked probable cause to cite and prosecute Howe. *Wilder v. Turner*, 490 F.3d 810, 813-14 (10TH Cir. 2007) (plaintiff must prove lack of probable cause in § 1983 action for unlawful arrest); *Hartman v. Moore*, 547 U.S. 250, 258 and 265-66 (2006) ("In an action for malicious prosecution

after an acquittal, a plaintiff must show that the criminal action was begun without probable cause for charging the crime in the first place;" plaintiff must prove lack of probable cause in First Amendment retaliation claim).

A.

FOURTH AMENDMENT SEIZURE CLAIM.

Regarding Plaintiffs' arguments on their Fourth Amendment seizure claims, it bears repeating that this cause of action is subject to dismissal for failure to demonstrate lack of probable cause (as argued in Part I.A. above) and failure to comply with the one-year statute of limitations (as argued in Part II above).

Next, while the trial court correctly interpreted the *Martinez* case in light of the facts at issue here, and correctly concluded that no Fourth Amendment seizure occurred as alleged by Howe, whether or not a seizure actually occurred is not really important. The real question on appeal is, did the trial court correctly rule that Plaintiffs failed to show, as a matter of law, that Defendants acted without probable cause? That question is not addressed by Plaintiffs in Part III.A of their brief regarding qualified immunity on their Fourth Amendment seizure claim.

B.

FOURTH AMENDMENT MALICIOUS PROSECUTION CLAIM.

The trial court properly granted summary judgment in Defendants' favor on Plaintiffs' "Fourth Amendment" malicious prosecution claim based on Plaintiffs' failure to show as a matter of law that Bryant did not have probable cause to "arrest" Howe. *Ruling at 33.* Plaintiffs' arguments regarding malicious prosecution under the Fourth Amendment reveal a fundamental misunderstanding of the relevant case law.

Where, as here, Howe was never incarcerated, his claim for malicious prosecution must be brought under the Due Process provision of the Fourteenth Amendment. *Wallace*, 127 S.Ct. at 1096 ("If there is a false arrest claim, damages for that claim cover the time of detention up until issuance of process or arraignment, but not more. From that point on, any damages recoverable must be based on a malicious prosecution claim and on the wrongful use of judicial process rather than detention itself."(citations omitted)); *Pierce v. Gilchrist*, 359 F.3d 1279, 1286 (10th Cir. 2004) ("The initial seizure is governed by the Fourth Amendment, but at some point after arrest, and certainly by the time of trial, constitutional analysis shifts to the Dues Process Clause."); *Becker v. Kroll*, 340 F.Supp.2d 1230, 1239-40

(D.Utah 2004) (Where plaintiff was never incarcerated, her claim for malicious prosecution fell under the Fourteenth Amendment).

Federal case law is clear that Plaintiffs have no cause of action for malicious prosecution in this matter under the Fourth Amendment to the United States Constitution. Further, the "facts" alleged in support of this non-existent cause of action are wrong. Bryant's consultations with his subordinate, Werner, regarding what statutes may apply to Howe's actions and whether Howe should be cited does not support any allegation that she encouraged or caused Howe's prosecution. The assertion that "Werner and Bryant set in motion the facts that led to Plaintiffs' injuries" is absurd. *Plaintiffs' Brief at 42*. The record reveals no support for Plaintiffs' assertion that Bryant expressed a desire to prosecute a member of the alarm industry, and even if he did, so what? It is his job to enforce the laws of the State of Utah. Finally, Plaintiffs' citations to the record in support of these "facts" provide no such support. *Id.*

C.

DISMISSAL FOR INSUFFICIENT PLEADINGS

"A plaintiff cannot amend the complaint by raising novel claims or theories for recovery in a memorandum in opposition to a motion to dismiss or for summary judgment because such amendment fails to satisfy Utah's

pleading requirements." *Holmes Dev , LLC v Cook*, 2002 UT 38, ¶ 31, 48 P.3d 895 (citations omitted). That is exactly what Plaintiffs did before the trial court in opposition to Defendants' Motion for Summary Judgment. The only defamation cause of action alleged by Plaintiffs was a state tort claim against Werner. Plaintiffs did not allege any federal "stigma plus" cause of action against Werner or any other Defendant, and they never sought leave of the trial court to amend their Complaint.

Even if they were adequately pleaded, Plaintiffs' "stigma plus" claims necessarily stand or fall on their defamation claims, which were untimely filed pursuant to Utah's one-year statute of limitations. Further, Plaintiffs' defamation claims could not have survived because they could not have proven that any of Werner's comments were defamatory.

In order to establish a claim for defamation, a plaintiff must show that "the defendants published the statements concerning him, that the statements were false, defamatory, and not subject to any privilege, that the statements were published with the requisite degree of fault, and that their publication resulted in damage." *West v Thompson Newspapers*, 872 P.2d 999, 1007-08 (Utah 1994).

Here, Plaintiffs cannot point to any allegedly defamatory statements specifically regarding Peak Alarm or Jerry Howe. Statements regarding the

"alarm industry" could refer to hundreds, if not thousands, of alarm companies and individuals nationwide. Such statements do not specifically identify any of the plaintiffs with sufficient particularity to be actionable in defamation.

Any allegedly defamatory statements regarding Jeff Howe were not false or defamatory. Shanna Werner is entitled to speak her mind publicly and express her opinions, as long as she does so in a manner that does not publish false factual statements regarding Jeff Howe. None of the statements attributed to Shanna Werner contained false information bearing on the reputation of Jeff Howe. At best, they are constitutionally protected opinion, and are not actionable in defamation. "Expressions of opinion, however, are fundamentally different. Opinions are inherently incapable of verification; they embody ideas, not facts." *West v. Thompson Newspapers*, 872 P.2d 999, 1014 (Utah 1994). "More importantly, expressions of opinion are the mainstay of vigorous public debate. Without opinion, such debate is virtually nonexistent." *Id.* The Utah Constitution provides that "[a]ll men have the inherent and inalienable right . . . to communicate freely their thoughts and opinions, being responsible for the abuse of that right." *Utah Const. art. I, § 1.* "Because expressions of pure opinion fuel the marketplace of ideas and because such expressions are incapable of being verified, they

cannot serve as the basis for defamation liability." *West*, 872 P.2d at 1015. Finally, plaintiffs cannot demonstrate that they were harmed by any statements allegedly made about them by Shanna Werner.

Further, the "stigma plus" claim is analyzed under the Fourteenth Amendment, and the trial court clearly concluded that Plaintiffs failed to show any extreme conduct on the part of any Defendant, including Werner, sufficient to demonstrate a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking. *Ruling at 26-27.* The same arguments apply to Plaintiffs' "non-retaliatory" First Amendment claims.

Finally, there is no First Amendment right to criminal speech. *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964) (knowingly false statements and false statements made with reckless disregard of the truth do not enjoy constitutional protection); *State v. Mattinson*, 2007 UT 7, ¶ 7, 152 P.3d 300 (communications that are false, fraudulent, or otherwise harmful to the interests of society made intentionally, knowingly or with reckless disregard receive no protection under the First Amendment).

D.

SUBSTANTIVE DUE PROCESS CLAIMS

In addition to the trial court's findings, as discussed in Part III.C. above, that no conscience shocking behavior was demonstrated against Defendants, Plaintiffs' claims regarding "substantial evidence" of malicious intent on the part of Werner and Bryant are overwrought and inaccurate.

An especially egregious example is found on page 48 of Plaintiffs' brief. In a blatantly misrepresented quote attributed to Shanna Werner, Plaintiffs insinuate that she "intended to punish Jeff Howe for his political speech, as Shanna Werner put it, to send 'a signal to other alarm companies.'" These six words were a small part of a larger quote attributed to Ms. Werner in an industry publication, in the context of Jeff Howe's prosecution, when she said she hoped that the enforcement of the City's ordinance goes well, and that if the jury "lets Peak Alarm off the hook, to me that's a signal to other alarm companies to call Salt Lake City police and tell them whatever they want." *R. 2523.* Obviously, Ms. Werner never stated any intention to punish Jeff Howe for political speech, nor did she ever state any intention to send any "signal" whatsoever to "other alarm companies." This egregious manipulation of Werner's words goes far beyond the "sheer verbal sophistry" they accuse the Defendants of using, starkly demonstrating

the kind of exaggerated and distorted claims they are willing to employ against the defendants in this litigation.

E.

SUPERVISORY LIABILITY

The trial court properly granted summary judgment to Chief of Police Dinse and Assistant Chief Atkinson. As a matter of law, Plaintiffs cannot demonstrate any "pattern of tortuous conduct" against Werner. As argued above, Plaintiffs' defamation claims were barred by the statute of limitations, and none of Werner's statements were defamatory toward any Plaintiff in this matter. Plaintiffs put forward no competent evidence to suggest that the City, Dinse or Atkinson failed to discipline Werner at any relevant point in time, that she violated any policy or standard for which she should have been disciplined, or that the City, Dinse or Atkinson were even aware of the alleged need to discipline her. The ratification/encouragement of Werner's superiors, as alleged by plaintiffs, are taken wholly out of context, had nothing to do with any Plaintiff or relevant events, and/or occurred well after the events complained of. Absent a showing of personal participation in the events complained of, and an affirmative link between the deliberate actions of the supervisor and the alleged constitutional

violations of the subordinate, Plaintiffs' claims based on supervisory liability must fail.

CONCLUSION

Defendants/Appellees respectfully request that this Court AFFIRM the trial court's decision to grant summary judgment in their favor.

Dated this 22nd day of April, 2009.

J. WESLEY ROBINSON
Senior Salt Lake City Attorney
Attorney for
Defendants/Appellees

CERTIFICATE OF DELIVERY

I hereby certify that on the 27th day of April, 2009, I caused to be hand-delivered two true and correct copies of the foregoing BRIEF OF APPELLEES to:

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